FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the D.C. Circuit's ACA International Decision	C.G. Docket No. 02-278 C.G. Docket No. 18-152

Reply Comments of Brett Freeman

My name is Brett Freeman, and I am writing both as an individual consumer who receives unwanted telemarketing calls on a near daily basis, and also as a consumer attorney who represents the very people who will be harmed by the changes to the TCPA sought by the calling industry. Based on the thousands of complaints filed each year with the FTC and the FCC by consumers throughout the country, there can be no doubt that robocalls are a serious problem. And the content of the call does not matter—consumers hate political robocalls, telemarketing robocalls, and debt collection robocalls. And, unfortunately, there is not much that a consumer can do to stop the constant incessant telephone calls that are being placed. While not a perfect statute, the TCPA does provide consumers with some relief from the constant intrusions that callers feel entitled to make. And, in order to ensure that this important consumer protection statute does not become a toothless sham, the Commission needs to adopt strong definitions of an ATDS, allow consumers to revoke consent using reasonable means, and protect consumers who receive reassigned telephone numbers from a constant deluge of telephone calls that they should never receive in the first place.

1. *The Commission should craft a strong ATDS definition that requires* *meaningful* *human intervention at the time that a telephone call is initiated.*

The most important task in front of the Commission is crafting a strong definition of an automatic telephone dialing system. I agree with the comments submitted by the National Consumer Law Center ("NCLC"), except with respect to the issue of potential capacity. In my opinion, a manually dialed call placed by a system that *could* autodial is no more intrusive than a manually dialed call placed by a system that *cannot* autodial. Rather, I believe that the correct inquiry should be based on whether the dialing equipment is placing telephone calls without meaningful human intervention at the time the call is initiated. As the D.C. Circuit acknowledged, focusing on human intervention "makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,'—would seem to envision non-manual dialing of telephone numbers."[3] While all unwanted telephone calls are intrusive, it is the companies that have the ability to dial hundreds or thousands of telephone calls without any meaningful human intervention that create the aggregate societal harm. Thus, the focus on *meaningful* human intervention is of paramount importance.

In recent years, callers have attempted to comply with the TCPA using new innovations. The most prevalent innovation I hear about are Human Call Initiator systems, or "HCI" for short.[4] NCLC provides a comprehensive description of these

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[3] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 703 (D.C. Cir. 2018)(internal citation omitted).

[4] The most common system is known as the LiveVox Human Contact Initator system. Based on a number of judicial decisions which held that this system was not

dialing systems in pages 25-27 of its comment, and I agree with that description. The "human intervention" provided by the "clicker agents" is nothing more than a sham designed to attempt to avoid TCPA liability. Attached hereto as Exhibit A is an affidavit that I obtained in December of 2017 from CBE Companies, Inc., which provides "clicker agent" services to callers. In the affidavit, CBE acknowledges that its subsidiary Madison Wyatt employs more than 75 persons in the Philippines who provide clicker services exclusively to one debt collection company, Diversified Consultants, Inc. ("DCI").[5] Paragraphs 9 and 10 of the declaration demonstrate just how much of a sham the clicker agent role is. Specifically, CBE admits that the clicker agents "provides no access to DCI account information."[6] And, the employees simply "utilize a computer mouse to 'click' on asterisks that appear on their computer screens. When the asterisk is clicked, a call is initiated through LiveVox HCI . . . ."[7] Additionally, CBE admits that "[t]he employees are provided no training regarding LiveVox HCI or DCI's computer system. The only training provided is limited to what is necessary for those employees to log into the system to click asterisks as they appear on their computer screens."[8]

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an ATDS, callers frequently refer to any similar system as an "HCI" system, in order to easily reference those judicial decisions.

[5] Ex. A at ¶ 8.

[6] *Id.* at ¶ 9.

[7] *Id.*

[8] *Id.* at ¶ 10.

While an individual clicking on an asterisk, may constitute *some* human intervention, it would be nearly impossible for anyone to argue that the human intervention is *meaningful*. Instead, there is no significant difference between a telephone call being placed by an asterisk being clicked and a call being placed using an autodialer. Both systems allow thousands of calls to be initiated without an actual person being on the line to speak to a consumer should he or she answer the phone.[9] And, just like an autodialer, use of clicker agents allow entities to place telephone calls at little or no additional expense.[10] As a result, there is an incentive for these entities to place as many calls as possible. Conversely, if an entity must pay someone to initiate a call *and* stay on the line until the call is terminated, the cost-benefit analysis of placing one million calls during a day would drastically change. In order to place the same number of calls, a caller would need significantly more employees, which would, of course, reduce profit margins. Thus, applying this meaningful human intervention standard would provide an incentive to callers to determine the most effective number of calls to place during a day to maximize

[9] CBE Group did not keep track of the volume of calls placed by the clicker agents. But, even if each of the 75 clicker agents "initiated" only one call per minute—which would be *extremely* unlikely—those agents could still initiate 36,000 calls in just eight hours. And, as it is likely that those same agents are "initiating" dozens of calls each minute, the actual number of calls that can be placed in eight hours could easily exceed one million.

[10] The *daily* minimum wage in the Philippines equates to approximately $10.00. *See* http://www.nwpc.dole.gov.ph/pages/statistics/stat_comparative.html, last visited June 28, 2018.

profits. Such a focus would protect the legitimate business needs of callers, while also limiting the number of interruptions that a consumer receives on a daily basis.

The Commission should reject the “clicker-agent” attempt to skirt the protections afforded by the TCPA. Instead, it should require that a call is placed with an ATDS unless there is *meaningful* human intervention at the time that the call is placed.

2. *The Commission should adopt a rule that ensures that consumers are able to revoke consent using any reasonable means—even if consent was initially provided as part of a contract.*

The Commission should also protect the right of consumers to revoke consent using any reasonable means. Again, I endorse the comments submitted by NCLC. The ability to revoke consent is paramount to my clients and to consumers everywhere. Many of my clients have found themselves in difficult financial situations, and are in debt to multiple companies. I know from personal experience the frustration of receiving just one or two unwanted telephone calls throughout the day. But, when an individual owes debts to multiple entities, they can easily receive upwards of 20 unwanted telephone calls in a single day.

The D.C. Circuit recognized that “[i]t is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.”[11] This right has been almost universally granted by Courts ever since the Third Circuit first held that “the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular phones by

[11] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 709 (D.C. Cir. 2018).

autodialing systems."[12] Callers will often argue that the consumer should not have initially provided consent if the he or she did not want to receive telephone calls. But, this argument ignores the reality of the situation faced by most debtors. Very few consumers *intend* to fall behind on their financial obligations. Rather, many have faced unforeseen circumstances such as job loss, unexpected medical emergencies, or divorce. And, when the consumer initially provided consent, there was no way to know how frequently and incessantly creditors and debt collectors would be able to call—a result that stems directly from the ability of callers to place telephone calls without meaningful human intervention. If the right to revoke is not protected by the Commission, consumers will be powerless to stop callers from placing hundreds—if not thousands—of calls to their cell phones in short periods of time.[13] These frequent intrusions prevent consumers from potentially receiving important phone calls regarding, *inter alia*, medical emergencies or child care issues.

Additionally, the Second Circuit recently refused to allow a consumer to revoke consent when that consent had been provided as part of a boilerplate contractual term.[14] The rationale for this holding was that consent was provided "as

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[12] *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 272 (3d Cir. 2013).

[13] *See, e.g., Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407 (M.D. Pa. 2014)(356 phone calls); *Zondlo v. Allied Interstate, LLC*, 290 F. Supp. 3d 296 (M.D. Pa. 2018)(vacated in part by agreement)(312 calls).

[14] *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017), *as amended* (Aug. 21, 2017).

bargained-for consideration in a bilateral contract."[15] Commentators have suggested that the Commission likewise hold that "contractual consent" cannot be unilaterally revoked by a consumer.[16] However, such a holding would ignore the realities of the consumer-creditor relationship. A regular consumer seeking to obtain a credit card or other loan has *no* bargaining power with respect to the terms of the contract. Rather, they are sent take-it-or-leave-it terms which they often do not receive until after they have already had to apply for the card—and, particularly with store brand credit cards, that they sometimes do not receive until after they have already made purchases with the credit card. Thus, any notion that consumers are voluntary making a choice to provide consent to receive telephone calls is erroneous. Instead, consumers are essentially forced to choose between having the ability to obtain a credit card—or some other type of credit product—and being able to meaningfully decide when to provide consent to receive telephone calls. Adopting the Second Circuit's rationale would allow the prior express consent exception to swallow the protections provided for by the TCPA—and it would have this effect without any meaningful choice being made by the consumer.

The Second Circuit's decision is also contrary to well-settled principles of contract law. If the credit card contract provides for prior express consent, it appears clear that a consumer's attempt to revoke that consent constitutes a breach of that agreement. But, a party is *always* free to breach the terms of the agreement.

[15] *Id.* at 56.

[16] *See, e.g.,* Comments of the Credit Union National Association.

As Oliver Wendell Holmes famously wrote 120 years ago in The Path of the Law: "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,**-and nothing else**."[17] Thus, even if a consumer revokes consent—and therefore breaches the contract—the correct remedy is simply to allow the caller to recover damages based on the breach.

Generally, in such an instance, a party is entitled to recover its expectancy damages.[18] Specifically, the non-breaching party should be put in the same position that it would have been in if the breach had not occurred.[19] However, under a pure expectancy damage evaluation, a caller might continue to robocall a consumer and then claim that its TCPA liability resulted from the consumer's breach of the contract. And, it would then seek to offset the statutory damages owed to the consumer with the expectancy damages owed to it. However, such a result would ignore the settled rule that a party to a contract is obligated to mitigate the damages that it incurs as a result of a breach.[20] Once this concept is considered, a

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[17] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897)(emphasis added).

[18] Restatement (Second) of Contracts § 347.

[19] *Id.*

[20] *See* 13 Williston on Contracts § 39:32 (4th ed.)("When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—it can either elect to allege a total breach, terminate the contract and bring an action or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach . . . .").

caller's proper post-revocation course of conduct is clear: the caller should stop placing robocalls.

In this situation, a caller could continue to place *manually* dialed calls to the cell phone. Of course, placing calls in this manner might not be as cost-efficient as using an autodialer. And, this *increased cost* is the proper measure of damages that a consumer could be liable for as a result of his breach. As an example, if we assume that a caller can place a robocall at a cost of $0.01, and a manual phone call at a cost of $0.10, then each phone call that was placed manually because of the revocation of consent, the caller could recover $0.09 as expectancy damages. Such a result ensures that callers are only incurring the cost it reasonably expected to pay as part of its collection efforts, while also preserving a consumer's right to stop automated calls from being placed to his or her cell phone.

However, in *Reyes* the court never considered whether a party could breach the contract. Instead, it simply held that the consumer could not *alter* the terms of the contract. But, as discussed above, there is no "alteration" of the contract terms. Instead, there is simply a breach. By holding that the consumer could not breach in such a manner, the court effectively ordered specific performance of the contractual term. And, specific performance is inappropriate where there are alternative remedies, such as a payment of expectancy damages.[21]

Policy reasons also justify such a holding. As the Commission is aware, the TCPA was enacted to protect consumers and the public at large. Thus, this

[21] Restatement (Second) of Contracts § 359.

Commission has stated that Congress determined that automated calls to cellular telephones "threaten public safety and inappropriately shift costs to consumers."[22] And, as the Eleventh Circuit has noted, "allowing consent to be revoked orally is consistent with the 'government interest articulated in the legislative history of the Act [that] enabl[es] the recipient to contact the caller to stop future calls.'"[23]

Obviously, boilerplate contractual provisions which purport to establish "binding consent" are contrary to the interests articulated by the TCPA. These provisions attempt to make a consumer powerless to stop hundreds of unwanted telephone calls.[24] Thus, the Commission unsurprisingly held, robocalls to cell phones threaten the public safety.

Unlike a traditional landline, a consumer almost always has his or her cell phone with him. So, for example, a consumer could receive numerous calls per day while driving. Imagine a situation where a consumer drives a truck long distances for a living. If he is behind on multiple debts, he could receive dozens of phone calls a day while driving on busy roads. And, a consumer receiving debt collection calls is likely to be far more upset by the calls than would be a consumer who simply receives a call from a family member or a friend. It is not difficult to see how such

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[22] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act,* FCC 07-232 at ¶ 14 (2008)(hereinafter "2008 FCC Order").

[23] *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014)(quoting *Maryland v. Universal Elections, Inc.,* 729 F.3d 370, 376–77 (4th Cir.2013))(brackets in original).

[24] *See* note 13, *supra.*

frequent and unpleasant distractions could endanger the health and safety of citizens. Precluding a consumer from restricting autodialed telephone calls placed, *inter alia*, while he is operating a vehicle, unnecessarily endangers the health and safety of not only the consumer, but also anyone else on or near the road.

Additionally, even if a contractual provision *could* theoretically eliminate a consumer's right to revoke consent, that provision could be void as being against public policy. It is a long standing doctrine that "[a] contract term or condition that violates public policy is void and is thus unenforceable."[25] And, "the doctrine of public policy reflects principles of law already enumerated by the Constitution and state and federal law."[26] Thus, a contractual term that is inconsistent with such a law can be voided for violating public policy.

In *Pryor*, a challenge was brought against the NCAA by two students who alleged that one of the NCAA's guidelines violated Title VI by purposefully discriminating against racial minorities. Specifically, this guideline increased academic standards necessary to be eligible for athletic scholarships. The students signed national letters of intent which conditioned acceptance of the athletic scholarship on satisfying the academic standards. When the students failed to satisfy these standards, they filed suit. The district court dismissed the claim, in part by concluding that because the students "had entered into these [national

[25] *Pryor v. Nat'l Collegiate Athletic Ass'n.*, 288 F.3d 548, 569 (3d Cir. 2002).

[26] *Id.* at 570.

letters of intent] and accepted their conditions, they could not now disregard them for purposes of § 1981."[27]

The Third Circuit reversed. In doing so, the court noted that the district court's conclusion that the students were bound by the contractual terms was "certainly logical."[28] But, it held that the district court's conclusion failed to account for the argument regarding alleged discrimination. The court then explained that a contractual term that violates public policy is void. And, because racial discrimination is against public policy, the court held that if the students could demonstrate that the guideline was adopted for the purpose of racial discrimination, the guideline was void on its face. Thus "the fact that the condition here was not performed does not serve as a basis for vitiating Plaintiffs' § 1981 claim."[29] As a result, *Pryor* directly stands for the proposition than a provision in a contract which is inconsistent with a statutory right is void.

The Commission has previously held that the TCPA *itself* contains a statutory right to revoke consent that is independent of the common law notions of revocation.[30] This determination was not set aside by the D.C. Circuit.[31] Thus, any

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 2015 Omnibus Order at ¶ 59 ("We do not rely on common law to interpret the TCPA to include a right of revocation.")

[31] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 709-10 (D.C. Cir. 2018).

contractual provision purporting to provide irrevocable consent would be attempting to override "principles of law already enumerated by the Constitution and state and federal law . . . ."[32] and should therefore be void for violating public policy.

Furthermore, a binding consent provision would eviscerate the protections afforded by the TCPA. If a consent provision can eliminate the substantial monetary risk that a potential TCPA lawsuit imposes on an institution, every creditor will immediately amend their agreements to include such a provision. Allowing such a contravention of the prior express consent requirement would transform the TCPA from a strong and important consumer protection statute into a meaningless sham. Such a result is clearly inconsistent with the important and necessary protections that are afforded to consumers by the TCPA. And, Congress certainly did not create the TCPA merely so that its protections could be ignored. This conclusion is especially true in light of the Commission's holding that the statute itself provides consumers with the ability to stop robocalls.

Thus, the Commission should hold that consumers are free to revoke consent that was provided in a contract, but that such a revocation does not eliminate a caller's contractual right to recover damages based on such a breach. And, it should further hold that the reasonableness standard that applies to revocation of "non-contractual consent" also applies to "contractual consent," while preserving a contracting party's ability to seek remedies for any breach.

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[32] *Pryor*, 288 F.3d at 570.

3. *The Commission should protect consumers who receive unwanted calls to reassigned numbers.*

Finally, the Commission should follow the Seventh Circuit's decision in *Soppet v. Enhanced Recovery Co., LLC*,[33] and hold that the term "called party" refers to the current user or subscriber of the telephone number. *Soppet*, which has been widely adopted nationwide, faithfully applied the term called party throughout the entire statute. Again, I agree with the comments of NCLC with respect to the reassigned number issue, including its support for the creation of a reassigned number database, and a narrow safe harbor that will protect callers who rely, in good-faith, on erroneous information contained in the database.

Conclusion

I appreciate the opportunity to submit these comments, both on behalf of myself and also on behalf of the financially distressed consumers I represent on a daily basis. I would be happy to answer any questions, or provide any information that would be helpful to the Commission.

s/ Brett M. Freeman
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[33] 679 F.3d 637 (7th Cir. 2012).

EXHIBIT A

Declaration from CBE Group

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYVANIA

KENNETH LUCK,

Plaintiff, **Case No. 17-CV-637**

v.

DIVERSIFIED CONSULTANTS, INC.,

Defendant.

_______________________________________/

DECLARATION OF JULIE ANDERSON

I, JULIE ANDERSON, declare under penalty of perjury, as provided for by the laws of the United States, 28 U.S.C. §1746, that the following statements are true:

1. My legal name is JULIE ANDERSON.

2. I am over the age of 18 and am otherwise competent to offer the testimony contained in this Declaration and am authorized to make this Declaration on behalf of CBE Companies, Inc.

3. I am employed by LocateSmarter, LLC, a wholly-owned subsidiary of CBE Companies, Inc. ("CBE")

4. CBE also owns Madison Wyatt, LLC ("Madison Wyatt").

5. Madison Wyatt has a business location in the Philippines from which it provides call initiation services to Diversified Consultants, Inc. ("DCI"), pursuant to a contract between Madison Wyatt and DCI.

6. My job duties include acting as the contact person between Madison Wyatt and DCI.

7. The information contained in this Declaration is based upon my personal knowledge gained through my employment with LocateSmarter and my duties as the contact person between Madison Wyatt and DCI.

8. Madison Wyatt employees more than 75 persons in the Phillipines who provide services exclusively to DCI.

9. Those employees log into a portal established by DCI. The portal provides no access to DCI account information. Instead, the portal is used to initiate calls utilizing LiveVox HCI. Specifically, Madison Wyatt employees utilize a computer mouse to "click" on asterisks that appear on their computer screens. When the asterisk is clicked, a call is initiated through LiveVox HCI, which provides connectivity to the telecommunications network.

10. The employees are provided no training regarding LiveVox HCI or DCI's computer system. The only training provided is limited to what is necessary for those employees to log into the system to click asterisks as they appear on their computer screens.

Executed on this 7th day of December, 2017.

Julie Anderson

JULIE ANDERSON